No. 385.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ship "Joseph B. Thomas," Samuel Watts *et al.*, Claimants, Appellants,

vs.

Jens P. Jensen, Appellee.

BRIEF FOR APPELLEE.

FRANK P. PRICHARD,
For Appellee.

Allen, Lane & Scott, Prs., Phila.

UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE NINTH CIRCUIT.

Ship "Joseph B. Thomas," Samuel Watts et al., *Claimants, Appellants,* vs. *Jens P. Jensen, Appellee.*	IN ADMIRALTY.

BRIEF FOR APPELLEE.

Most of the elaborate brief on behalf of the appellants is devoted to a discussion of disputed questions of fact. The decision of the case, however, did not turn in the court below, and does not depend in this court, upon the settlement of any dispute as to facts, but is governed by the application of well-settled legal principles to certain facts which are not in dispute. Those facts are as follows :—

1. While the ship "Joseph B. Thomas" was lying in the port of Philadelphia and was being loaded by a stevedore, the libellant, who was in the employ of the stevedore and was working in the hold of the ship, was struck on the head by a keg belonging to the ship and which fell from the main deck through an open hatch.

2. The accident happened in the afternoon of Apirl 11th, 1892. The three hatch covers of the main deck had been taken off in the morning and piled one on top of the other on the main deck immediately adjacent to the forward hatch, the top cover being about flush with the top of the hatch combing. These covers were slightly curved, and each had on top four ring bolts by which to lift it. The keg belonged to the ship. It had been painted by some one connected with the ship, and some time in the forenoon had been set on top of these hatch covers to dry. Some one stepped on or jarred the hatch covers, and this caused the keg to roll off into the open hatch, falling thirty feet and striking libellant, who was at work underneath.

3. The libellant's skull was fractured, resulting in paralysis and permanent disability. At the time of the accident he was a strong, muscular man, twenty-nine years of age, and in good health.

A brief comparison of the account of the accident given by libellant's witnesses with that given by claimants' witnesses will show that they agree with each other as to the above facts.

The best account given in libellant's proofs was that given by John F. Fitzgerald, an entirely disinterested witness, in the employ of the Pennsylvania Railroad and not connected with either party. His testimony (Record, page 34) was as follows:—

Q. Please state in your own way what you saw of this accident?

A. The mate was between decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up—the stevedore—to get up on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he tread on that hatch, and that hatch upset the barrel, and the barrel fell down in the hold. It wasn't a barrel; it was a keg.

Q. Where was the keg standing at the time of the accident?

A. Right on the corner of the hatch. The hatches were taken off, and then put one on top of the other, and the keg set over, and when you tread on that corner of the hatch that turned the keg over, and it rolled right down the hatch before anybody could get hold of it.

Q. Who was the young man that trod on the hatch?

A. A young man belonging to the ship.

The account given for claimants by Edward Peterson, the second mate (Record, page 112), was as follows:—

Q. Go on; state how it happened?

A. There was a little keg standing on one corner of the hatch cover—on the port corner of the hatch cover—and one of the men happened to touch the top hatch cover on the starboard side, and through that it started the keg off the hatch cover and the keg went down through the hatch and struck the man.

Q. Who was the man that trod on the hatch cover?

A. One of the stevedore's men. Which one it was I cannot say.

* * * * * *

Q. What was the stevedore's man doing when he trod upon the hatch cover?

A. I don't exactly know what he was doing. He just happened to come along and touch the hatch cover. Either he was going down in the hatch, or what he was going to do, I don't know. I know he just happened to touch the hatch cover the least mite.

As to the ownership of the keg the testimony was in accord.

Patrick O'Donnell, libellant's witness, testified (Record, page 47):—

"A. It was a keg about the size of a vinegar barrel "or cider barrel. They generally use them for a "water cask in the forecastle. I should judge about "two feet high.

"Q. Did it belong to the stevedore's men?

"A. No, sir; it belonged to the vessel, I suppose. "It didn't belong to the stevedore."

Edward Peterson, claimants' witness, testified (Record, page 122):—

"Q. You say it was a pickle keg?

"A. It had been a pickle keg, but used at the "present time for fresh water to drink in the room.

"Q. It belonged to the vessel?

"A. Yes, sir."

As to the construction of the hatch covers and the fact that they were piled adjacent to the hatch with their tops about on a level with the hatch combing, there was also an agreement of testimony.

John F. Fitzgerald, libellant's witness, testified (Record, page 39):—

"A. There was a hole, and the hatches were taken "off and set forward.

"Q. Alongside of the hatch?

"A. Yes, sir.

"Q. And the three hatch coverings, therefore, would "come up a little higher than the combings?

"A. They would come about even."

And John Brown, another of libellant's witnesses, testified (Record, page 72):—

"Q. When one hatch covering is put on top another "one, the top one rests upon the ring bolts?

"A. Yes, sir."

Edward Peterson, the witness called for claimants, testified (Record, page 115):—

"Q. How many hatch covers were there?

"A. Three.

"Q. Were they crowning at all?

"A. Yes, sir; a little crown to the hatch."

(Record, page 116.)

"Q. On which side of the hatch, on the main deck, "were these hatch covers piled, forward or aft?

"A. On the forward.

"Q. How near to the hatch combing?

"A. As close as they could lay; as close as they "could pile them alongside of the hatch combing."

(Record, page 117.)

"Q. How high was the combing to that hatch?

"A. About eighteen inches, I guess; no, not so "much as eighteen. I should say twelve inches. On "the forward part the combing is not so high on "account of there being some thick planks, thicker "than the deck * * *"

(Record, page 118.)

"Q. How is that hatch cover divided; into how "many pieces?

"A. Three parts.

"Q. How high are those parts each? How thick?

"A. Each is about four inches.

"Q. Four inches high?

"A. Yes, sir; four inches."

The testimony of the witnesses on both sides was also in accord as to the length of time during which the keg had been allowed to stand on this pile of hatch covers adjacent to the opening of the hatch.

Chris Nelson, a witness for libellant (Record, page 62), testified:—

"Q. Did you see that keg before?

"A. Yes, sir; I saw it that forenoon. A young "man was sitting painting it, and set it there to dry "on the hatches.

(Record, page 65.)

"Q. What time of day was it that you saw this "barrel setting on the hatch coverings to dry?

"A. Some time in the forenoon.

"Q. What time of day was it that the accident "happened?

"A. In the afternoon.

"Q. About what time, if you recollect?

"A. Between two and four o'clock."

Edward Peterson, witness for the claimant (Record, page 122), testified :—

"Q. How long before the keg fell did you see it "there?

"A. I couldn't say exactly. It is so long since now, "and I did not carry it in my memory. * * *

"Q. Did it have its cover off?

"A. Yes, sir; no cover on.

"Q. One of its heads off?

"A. Yes, sir; one of the heads was off. The hoops "had been painted."

It will thus be seen that there is practically no dispute that the libellant while in the employ of a stevedore, and properly working underneath the forward hatch, which was open, was injured by the fall of a keg which had been painted and left to dry on top of some hatch covers piled adjacent to the open hatch on an upper deck; and that the cause of the fall of the keg was the fact that some one trod on or jarred the hatch covers, whereupon the keg, being empty, and not secured in any way, rolled down the open hatch.

Upon these undisputed facts the law is clear.

There was a duty on the part of the ship to protect libellant while at work.

In the case of—

Leathers *vs.* Blessing, 105 U. S., 626,

a person who went on board of a vessel for lawful business was injured by the fall of a cotton bale. The court (Blatchford, J., delivering the opinion) said :—

"This makes the case one of invitation to the li-
"bellant to go on board in the transaction of busi-
"ness with the master and officers of the vessel, rec-
"ognized by them as proper business to be transacted
"by him with them on board of the vessel at the
"time and place in question. Under such circum-
"stances, the relation of the master, and of his co-
"owner through him, to the libellant was such as to
"create a duty on them to see that the libellant was
"not injured by the negligence of the master."

In the case of—

Gerrity *vs.* "The Kate Cann," 2 Fed. Rep., 241,

a stevedore was injured by the fall of dunnage and plank upon him. The court (Benedict, J.) said :—

"There was a relation between the shipowner and
"the libellant arising, not out of the mere presence
"of the libellant on board the ship, but out of the
"service he was then engaged in performing, the
"necessity of that service to the shipowner, and the
"circumstances of the libellant's employment to per-
"form that service. The libellant had, therefore, a
"right to be where he was; and it follows that there
"was a duty on the part of the owner to see to it

"that the dunnage and plank stowed above him were "so secured as to prevent its falling upon him of its "own weight."

This case was affirmed on appeal. See—

"The Kate Cann," 8 Fed. Rep., 719.

In the case of—

"The Phœnix," 34 Fed. Rep., 760,

a stevedore was injured by the fall of cotton through a defective sling furnished by the ship. The court said:—

"When a stevedore has full charge of the loading "or unloading of a vessel, and one of his gang suffers "injury by reason of a defective tackle furnished by "the vessel, she is responsible if there be absence of "due care upon the part of her master in furnish- "ing the tackle, or in maintaining it in a safe con- "dition; that is to say, if he knew, or if the circum- "stances were such as to put him on the inquiry so "that he could know, that the tackle was not safe."

In the case of—

Crawford *vs.* "The Wells City," 38 Fed. Rep., 47,

a stevedore was injured by the fall of hatch covers upon him. The court (Benedict, J.) said:—

"Several points are made on the part of the de- "fense. One is that the libellant was at the time of "the accident a servant of the claimant, engaged in a "common employment with the sailors who under- "took to place the cover in position, and therefore

"cannot recover for negligence of a fellow servant. "Upon this point my opinion is that the relation of "fellow servant did not exist between the libellant "and the mate who directed the placing of the covers, "or between the libellant and the seaman who were "engaged in handling the covers at the time the cover "fell."

In the case of—

The "Frank and Willie," 45 Fed. Rep., 494, a seaman was injured by the fall of shaky tiers of lumber. The court (Brown, J.) said:—

"The principle involved, viz., the duty to provide "reasonable security against danger to life and limb, "by at least the usual methods, when these dangers "are brought home to the knowledge of the proper "officers, is manifestly a general one. It attends the "seaman wherever he is required to go on shipboard "in the performance of his duties, and applies as "much to a dangerous condition of the cargo as to "defective rigging or a rotten spar. In the case of "the 'Kate Cann,' 2 Fed. Rep., 241–245, the bark "was held by Benedict, J., liable to an injured steve- "dore, because the dunnage and plank where he was "required to work in the ship's hold had not been "properly secured, the dangerous situation being held "a violation of a duty that the ship and her owners "owed to the workmen. The same principle has been "repeatedly applied in this court in favor of steve- "dores or their employees on board. 'The Helios.' "12 Fed. Rep., 732; 'The Max Morris,' 24 Fed.

"Rep., 860; 'The Guillermo,' 26 Fed. Rep., 921;
"'The Nebro,' 40 Fed. Rep., 31."

In the case of—

"The Terrier," 73 Fed. Rep., 265,

a stevedore was injured by the fall of a plank which slipped out of the hands of one of the crew while relaying an upper deck. The court (Butler, J.) said:—

"There is no room for serious controversy about "the facts involved. While the libellant, with other "stevedores, was engaged in the vessel's hold, unload- "ing cargo, her agents and servants commenced relay- "ing the floor of the between deck. This floor had "been taken up and stored above for convenience in "placing cargo. In passing the flooring down through "a hatch immediately over the heads of the steve- "dores a plank was allowed to fall, and, striking the "libellant, inflicted serious injury. There was care- "lessness, both in passing the flooring down through "this hatch and in allowing the plank to fall. It "should have been passed through another hatch, "equally convenient, whereby all danger would have "been avoided. The work was being performed by "the crew under the supervision of one of the mates. "The evidence does not leave these facts in doubt.

"Is the ship responsible for the libellant's injury? "This is the only question raised. In my judgment "she is. First, because she inflicted the injury. This "flooring was as much a part of her as was any other "part of the structure; that it was out of place at the

"time is not important. As is said in the 'Kate Cann,' "8 Fed., 719 (under similar circumstances), 'in legal "'effect the blow inflicted was inflicted by the ship.' "And second, because it was her duty to see that the "place where the stevedores worked was safe, while "they were upon her. Cannon *vs.* 'The Protos,' 48 "Fed., 919, and Records of Dist. Ct., E. D. Pa., No. 8 "of 1889; 'The Kate Cann,' 2 Fed., 243, 8 Fed., 719; "'The Frank & Willy,' 45 Fed., 494; 'The Wells "'City,' 38 Fed., 48; 'The Carolina,' 30 Fed., 200; "'The Helios,' 12 Fed., 732; Sherlock *vs.* Alling, 93 "U. S., 108."

The fact of the fall of the ship's keg from the main deck through the hatch upon the libellant below raises a presumption of negligence on the part of the ship.

It is, of course, not contended that the mere happening of an accident raises a presumption of negligence, but when an article belonging to and under the control of defendants falls upon the plaintiff, there is a presumption of negligence which the defendants must rebut.

In the case of—

Byrne *vs.* Boadle, 2 Hurl. & Colt., 721,

a barrel of flour fell from defendant's shop upon a passerby and injured him. It was held that there was a presumption of negligence, Pollock, C. B., saying:—

"A barrel could not roll out of a warehouse with-"out some negligence, and to say that a plaintiff who

"is injured by it must call witnesses from the ware-
"house to prove negligence seems to me preposterous.
"So in the building or repairing a house, or putting
"pots on the chimneys, if a person in passing along
"the road is injured by something falling upon him,
"I think the accident alone would be *prima facie* evi-
"dence of negligence. Or if an article calculated to
"cause damage is put in a wrong place and does
"mischief, I think that those whose duty it was to
"put it in the right place are *prima facie* responsi-
"ble, and if there is any state of facts to rebut the
"presumption of negligence, they must prove them."

In the similar case of—

Scott *vs.* The London, &c, Docks Co., 3 Hurl. & Colt., 596,

Erle, C. J., said:—

"There must be reasonable evidence of negligence.
"But where the thing is shown to be under the
"management of the defendant or his servants, and
"the accident is such as in the ordinary course of
"things does not happen if those who have the
"management use proper care, it affords reasonable
"evidence, in the absence of explanation by the de-
"fendants, that the accident arose from want of care."

This language is cited and followed in—

Dixon *vs.* Plums, 98 Cal., 384.

In that case respondent, while walking upon the sidewalk of a street, was struck by a chisel which fell from a scaffolding plank on which one of the

defendant's employees was working. It was held that this established a *prima facie* case of negligence on the part of defendant.

In the case of—

Sheridan *vs.* Foley, 33 Atl. Rep., 484.

one engaged in laying a sewer in a building in course of erection was injured by a brick falling from above, and it was held that there was a *prima facie* case of negligence on the part of the contractor, the court saying :—

"The bricks were in the custody of the defendant's "servants at the time when this one fell, and it was "their duty to so handle them as not to endanger "others who were engaged in other work upon the "same premises. This brick could not have fallen of "itself, and the fact that it fell, in the absence of ex- "planation by the defendant, raises a presumption of "negligence. If there are any facts inconsistent with "negligence, it is for the defendant to prove them."

The placing of the empty keg in such a position that an accidental jar or disturbance would precipitate it upon persons lawfully working below was in itself negligence, and the fact that the jar or disturbance was caused by the intervening agency of a third person would not relieve the ship.

According to libellant's testimony, the hatch covers were properly piled, but from the nature of their construction a person treading on them would necessarily

destroy the equilibrium of a keg set on top of them. The testimony of respondents, on the other hand, was that the hatch covers were manifestly piled so improperly that a slight jar would destroy the equilibrium of the keg, Mr. Anderson, the mate, testifying that the man "just happened to touch the hatch "cover the least mite." On either theory the keg was placed by a ship's employee in a place where if any one trod on or jarred the hatch covers it would probably roll down the hatch. This was the real negligence in the case, and it makes no difference who trod on or jarred the hatch covers. An empty keg is an object whose equilibrium is easily disturbed. It should not have been set to dry in the neighborhood of open hatches, but if it were so set it might at least have been placed on the deck where the hatch combings would have afforded some guard to prevent it from rolling down the hatch. Instead of that, it was set substantially on a level with the hatch combings on a necessarily insecure foundation and in close proximity to a hatch underneath which the stevedores were working. It was set in that position by a ship's employee, and seen in that position by the ship's officer, who did not remove it. Clearly, this was negligence.

In the case of—

White *vs.* France, L. R., 2 Com. Pleas, 308, a bale of goods was left nicely balanced on the edge of a trap door and fell upon a passerby. It was held that the occupier of the premises was negligent.

In the case of—

Pastene *vs.* Adams, 49 Cal., 87,

defendants were lumber merchants, and had a pile of lumber so insecurely piled that when a third person driving in from the street caught his wheel in the end of one of the timbers, the whole pile fell on a visitor. The court held that the defendant's were liable, and that their negligence was the proximate cause of the injury.

In the case of—

McCauley *vs.* Norcross, 155 Mass., 584 (30 N. E. Rep., 464), defendants were erecting a building, and some iron beams were so placed near an open hole in the floor that when the superintendent in passing pushed one of the beams with his foot, it fell on an employee below. It was held that defendants were liable, the court (Allen, J.) saying:—

"The fact that the superintendent himself happened "to be the person who pushed the beam with his foot "is of no importance, because that was not an act of "superintendence. If the beams were so left that one "of them would be liable as a natural consequence, "from such intervening cause or agency, to be so "moved that it might fall through the floor, the fact "that an intervening act or agency occurred which "directly produced the injurious result would not "necessarily exonerate the defendants from responsi- "bility. Superintendence is necessary in order to "guard against injuries from such intervening and "inadvertent acts of careless persons as are likely to

"happen, and ought to be guarded against. The "question is whether the moving of a beam was so "likely to occur that it ought to have been provided "against by the superintendent. It might be found "that the beams were negligently left near the hole in "the floor, where they were likely or liable to be "toppled over, so that one of them might fall through "the hole and thus injure some one below, and that "this was the proximate cause of the plaintiff's injury, "although some careless person came along and top- "pled them over."

In the case of

Johnson *vs.* 1st Nat. Bank Ashland, 48 N. W. Rep., 712,

the defendant allowed snow and *debris* to be thrown and remain upon the roof of a shed under which its employees were working. It was held liable, although the negligent act of a co-employee also contributed to the injury, the court (Orton, J.) saying:—

"It is elementary law that the master must furnish "a safe place in which he requires his servant to "work, and furnish him with safe appliances. The de- "fendant is liable to the plaintiff for an injury caused "by its agents permitting such a weight to be thrown "and remain on the roof of the shed in which the "plaintiff was required to do his work as to render his "work unnecessarily hazardous. Bessex *vs.* Railroad "Co., 45 Wis., 477. The general duty of a master to "exercise care to prevent the exposure of his servant "to unnecessary and unreasonable risk requires him,

"among other things, to use diligence in seeing that "the place where he works is safe: Cook *vs.* Railroad "Co. (Minn.), 24 N. W. Rep., 311. McDonald *vs.* Rail- "road Co. (Minn.), 43 N. W. Rep., 380; 2 Thomp. "Neg., 772. The act of the defendant in ordering the "plaintiff to work in a place that was not safe, and "which caused him injury, makes the defendant lia- "ble, if the defendant knew or ought to have known "that such place was unsafe, although the negligence "of a fellow servant may have contributed to the "injury, if he was himself free from fault. McMahon "*vs.* Henning, 3 Fed. Rep., 353; Heckman *vs.* Mackey, "35 Fed. Rep., 353. If the injury was caused by the "negligence of the defendant corporation in requiring "the plaintiff to work in a dangerous place, the neg- "ligence of a co-employee will not defeat a recovery. "Stetler *vs.* Railroad Co., 46 Wis., 497; 1 N. W. Rep., "112; Paulmier *vs.* Railroad Co., 34 N. J. Law, 151. "In view of the authorities in application to the facts, "the liability of the defendant in this case seems to "have been established. The superintendent, Scott, "and the foreman, Huston, were responsible between "them for the falling of the shed. They probably "ordered the rubbish and the snow to be thrown on "the shed, and at least knew of it. They ordered the "snow to be thrown from the roof of the bank build- "ing upon the shed to keep it from breaking down "the roof of that building, but were careless and neg- "ligent as to its greater liability to break down the "roof of the shed. They made a 'dead fall' and re- "quired the plaintiff to work under it."

These cases only affirm the general rule, which is well stated in—

Clerk & Lindsell on Law of Torts, pages 370–376, as follows:—

"So the owner of premises owes a duty towards "those whom he invites there to take care to see "that the premises are in a fit state of repair, and "if owing to his omission to exercise care in this "respect, bricks or tiles or other portions of the "structure of a building fall upon them, he is lia- "ble; similarly will he be liable if he negligently "leaves some chattel, such as a bale of goods, deli- "cately poised in such a position as to be likely to "fall and injure them.

* * * * * *

"To establish the defendant's liability, his negli- "gence need not necessarily have been the immedi- "ate cause of the injury; provided it be a substan- "tial part of the cause, he will be none the less "liable because the injury may have been contribu- "ted to by the intervening negligence of a third "person. Abbott *vs.* Macfie, 2 H. & C., 744; Clark "*vs.* Chambers, 3 Q. B. D., 327."

Even if the negligence of a co-employee contributed to the injury, this would not exonerate the ship.

"The Phœnix," 34 Fed. Rep., 760.

It is respectfully submitted that it is not necessary to enter into the question as to the veracity of witnesses in this case, since under the authorities cited, the ship is clearly responsible upon the facts which

are agreed to by all the witnesses, and this is the conclusion at which the learned judge of the court below finally arrived in his opinion.

If, however, this court should think it material to take up the other facts in the case which are in dispute, to a discussion of which most of the brief of the appellant's counsel is devoted, then it is submitted that the evidence amply justified the finding of the court below. A few words will suffice to state the position of appellant on these questions.

It will be observed that the disputed questions of fact were only two, viz. :—

First.—Was it a stevedore or a sailor who trod upon, or jarred, the hatch covers?

Second.—Were the hatch covers improperly piled?

With regard to the second of these questions there really was no serious conflict, nor was there any evidence on which the court below could have found that the covers were improperly piled. All the libellant's witnesses who testified on the subject said that the hatch covers were piled one on top of the other, in the usual way, and that there was no more secure way to pile them. The claimants' counsel has inadvertently fallen into error, on page 19 of his brief, in stating that counsel for libellant objected to the question as to whether the hatch covers were properly or improperly piled. An inspection of the record on page 56, to which he refers, and also on the preceding page, 55, will show that the objection came from

the counsel for the claimants. It was, however, directly testified that they were piled in the usual manner, and that there was no other way of piling them which would have rendered them any safer. (Record, page 56.) On the other hand, there was no testimony in the part of the claimants which would have justified a finding that they were improperly piled. It is true that the mate, Edward Peterson, testified (Record, page 115):—

"Q. What was the reason that this hatch cover "tipped when the stevedore's men touched it or "stepped upon it?

"A. It was not laid down as it ought to be. It "was not laid down solid. If the hatch coverings "were put down as they ought to be, one on top of "the other, there would not be any trouble attached "to it; but they just put them down any way at "all, as they were always in a hurry."

It will be observed that this witness points out no way by which three covers having curved tops and ring bolts in each corner of the top can be laid down on top of each other so as to make them solid. The only light he gives as to the method is that they should put one on top of the other, and yet this description of the proper method of piling is the one which counsel for appellants ridicules on page 19 of his brief when given by the witnesses for the libellant. The learned judge who delivered the opinion was therefore fully justified in dismissing this part of the case with the statement that so far

as the evidence disclosed, the hatch covers were piled in the usual and proper manner.

It may be added that the testimony of the claimants on this point proves too much for their case. The mate says (Record, page 119):—

"Q. Before this accident, that day, had you noticed that these covers were not properly laid on the deck—this particular day and these particular covers?

"A. Yes, sir; I did. I see the way they were laying, but it was so usual to see them that way nearly all the time. When I had time to do it myself I altered them.

"Q. Why did you not alter them that day?

"A. I had not time to do it, and it was not my place to do it."

It is not pretended that the alleged improper piling occasioned any danger that the hatch covers themselves would fall into the hatch. Nor was it reasonably to be anticipated that any one would select such an insecure place as the top of three curved hatch covers, each resting on ring bolts, and all adjacent to an open hatch, as a place to dry an empty keg. The mate's testimony, however, establishes the fact that the alleged insecurity of the piling, if it existed, was apparent to the eye, and thus fastens negligence conclusively both on the ship's employee who set the keg on this insecure foundation adjacent to the hatch, and on the mate himself, who said that the covers were insecure, and who saw the keg on top of them but who did not remove it.

The other question of fact, namely, whether a sailor or a stevedore trod on the hatch covers, was one on which, as the learned judge states, the testimony is irreconcilably conflicting. It is not proposed in this brief to follow the able counsel for the claimants in his labored effort to prove that the conclusion of the learned judge below as to this fact was wrong. It is submitted that irrespective of the weight which the court of appeal would give to a decision of the court below on a question of fact made after a very thorough and careful review of conflicting evidence, an independent examination of the evidence by the court of appeal will necessarily lead to exactly the same result. The respondent's testimony consisted entirely of interested witnesses. It was contradicted by the testimony of the stevedores (every stevedore that worked on the ship being called). If the stevedores are also classed as interested witnesses and their testimony is set up against the claimants' witnesses, the case would then rest upon the testimony of the two disinterested witnesses, viz., Fitzgerald (Record, page 34) and Grey (Record, page 98). These parties were entirely disinterested. They attended on subpœna (Record, page 43), and neither their character nor their motives were impeached. Their testimony is directly in conflict with respondents' witnesses, and corroborates the story told by the libellant's witnesses. The criticisms which counsel for appellant makes upon the testimony can best be answered by simply referring to the evidence itself. If that is read, it will appear that these criticisms are unsound. Counsel for appellee

appeals with great confidence to the testimony, and believes that on this question of disputed fact a careful reading of the testimony is more convincing than any brief that can be written.

What has been said with regard to the disputed questions of fact has been said simply because they have been discussed, not because they are believed to be material to the decision. The position of the appellee is that it was negligence on the part of the employees of the ship to place an empty keg upon a pile of covers, the top of which was flush with and adjacent to an open hatchway, and to allow the keg to remain in that position where a jar or movement of the covers would precipitate it into the hole below. If this be correct, it matters not whether the person who trod on or touched the covers was a sailor or a stevedore, or whether the covers were properly or improperly piled.

It is submitted, therefore, that the judgment of the court below should be affirmed.

FRANK P. PRICHARD,
For Appellee.